**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellant

-vs-

**DWAYNE EDMUND WILSON**

Defendant-Appellee.
_____/

**Supreme Court No.** 154039

**Court of Appeals No.** 324856

**Lower Court No.** 09-2637-FC

**MACOMB COUNTY PROSECUTOR**
Attorney for Plaintiff-Appellant
_____

**PETER JON VAN HOEK (P26615)**
Attorney for Defendant-Appellee
_____

# SUPPLEMENTAL BRIEF

**STATE APPELLATE DEFENDER OFFICE**

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## STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Macomb County Circuit Court by jury trial, and a Judgment of Sentence was entered on November 19, 2014. A Claim of Appeal was filed on November 25, 2014, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated November 19, 2014, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

## STATEMENT OF QUESTIONS PRESENTED

**I. SHOULD THIS COURT DENY LEAVE TO APPEAL TO PLAINTIFF-APPELLEE, AND REAFFIRM THE HOLDING IN *PEOPLE V STEWART*, 441 MICH 89; 490 NW2 327 (1992), THAT WHERE TWO OR MORE FELONY-FIREARM CONVICTIONS ARISE FROM A SINGLE CRIMINAL EPISODE, THOSE CONVICTIONS SHOULD COUNT AS ONLY ONE FELONY-FIREARM CONVICTION FOR THE PURPOSES OF THE GRADUATED PUNISHMENT SCHEME UNDER MCL 750.227B?**

Defendant-Appellee answers, "Yes".

## STATEMENT OF FACTS

Defendant-Appellee Dwayne Edmund Wilson was convicted, at a jury trial in Macomb County Circuit Court, the Hon. James Biernat Jr. presiding, of two counts of unlawful imprisonment, MCL 750.349b, and one count of possession of a firearm in the commission of a felony, MCL 750.227b. The trial in this matter occurred on September 24 - October 8, 2014. On November 19, 2014, Judge Biernat sentenced Mr. Wilson to a prison term of ten years, to be followed by concurrent terms of 100 to 180 months in prison, with jail credit of 1997 days.[1] Defendant appealed as of right from the convictions and sentences.

On May 10, 2016, the Court of Appeals issued an unpublished, per curiam opinion, affirming the convictions but ordering the felony-firearm sentence to be reduced to five years, and remanding the case to the trial court for reconsideration of the unlawful imprisonment sentences pursuant to *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015).[2] The Court denied Mr. Wilson's claim that the trial judge misscored the guidelines for the unlawful imprisonment convictions.

On July 5, 2016, Mr. Wilson filed a timely Application for Leave to Appeal in this Court. That application raised issues as to the affirmances of the convictions, and the Court of Appeals' decision on the scoring of the sentencing guidelines. That Application was denied by this Court on November 17, 2016. *People v Wilson*, Docket No. 154041

[1] The trial in this present matter was a retrial, after the convictions in the initial trial were reversed by the Michigan Court of Appeals on May 10, 2011 [*People v Wilson*, CA No. 296693], and after this Court, on leave granted as part of an interlocutory appeal by the prosecution, held that Mr. Wilson could not be recharged with a count of felony-murder at the retrial on the basis of a double jeopardy analysis. *People v Wilson*, 496 Mich 91; 852 NW2d 134 (2014).

[2] Appendix A.

On July 11, 2016, Plaintiff-Appellant filed an Application for Leave to Appeal in this Court. That application challenged the Court of Appeals' decision that Mr. Wilson was improperly sentenced as a third violator of the felony-firearm statute[3] to the mandatory prison term of ten years. The Court of Appeals held, in reliance on this Court's opinion in *People v Stewart*, 441 Mich 89; 490 NW2d 327 (1992), that where more than one felony-firearm conviction arises in a single case, only one conviction is counted for the purposes of a subsequent conviction under that statute. While Mr. Wilson does have two prior convictions for felony-firearm, both arose out of the same case[4], and thus his current conviction, under *Stewart*, was found by the Court of Appeals to be treated as a second felony-firearm conviction, requiring the mandatory five year term preceding the terms for the unlawful imprisonment convictions. Appendix A.

On November 17, 2016, this Court directed the parties to file supplemental briefs, and conduct oral arguments, on whether this Court should grant leave to appeal on issues raised in the Prosecution's application:

> The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether MCL 750.227b(1) of the felony-firearm statute requires two prior convictions under this subsection to have arisen, from separate criminal incidents in order for a third conviction under the subsection to trigger the 10-year imprisonment penalty; and, if not (2) whether this Court should overrule *People v Stewart*, 441 Mich 89 (1992), which, in holding that the two prior convictions must have arisen from separate criminal incidents, relied upon *People v Preuss*, 436 Mich 714 (1990), the reasoning of which was overruled by *People v Gardner*, 482 Mich 41(2008).

[3] MCL 750.227b.
[4] See Appendix B – relevant pages from presentence report.

## I. THIS COURT SHOULD DENY LEAVE TO APPEAL TO PLAINTIFF-APPELLEE, AND REAFFIRM THE HOLDING IN *PEOPLE V STEWART*, 441 MICH 89; 490 NW2 327 (1992), THAT WHERE TWO OR MORE FELONY-FIREARM CONVICTIONS ARISE FROM A SINGLE CRIMINAL EPISODE, THOSE CONVICTIONS SHOULD COUNT AS ONLY ONE FELONY-FIREARM CONVICTION FOR THE PURPOSES OF THE GRADUATED PUNISHMENT SCHEME UNDER MCL 750.227B.

**Standard of Review:**

The applicable appellate standard of review for this issue of statutory construction is *de novo*. See *People v Buehler*, 477 Mich 18; 727 NW2d 127 (2007).

**Argument**:

Plaintiff-Appellant's Application for Leave asks this Court to overrule the precedent of *People v Stewart, supra*, and reinstate Mr. Wilson's ten year prison term, on the basis that this Court, in *People v Gardner*, 482 Mich 41; 753 NW2d 78 (2008), overruled its prior decision in *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990). In *Preuss*, This Court had held that, for the purposes of the habitual offender statutes, multiple convictions arising out of a single incident counted as only one prior felony conviction for habitual offender sentencing in subsequent cases. Plaintiff is arguing that since this Court in *Stewart* relied upon some of the reasoning in *Preuss* to reach its result, that decision was "implicitly" overruled by the decision in *Gardner*. The Court of Appeals below correctly held, however, that only this Court can overrule one of its own opinions, and that *Stewart* remains the controlling published authority on the precise issue presented in this case.

This Court should deny leave to appeal, and uphold *Stewart*. If in fact the decision in *Gardner* eliminated all of the reasoning behind the decision in *Stewart*, it is highly likely that this Court, given the considerable number of felony-firearm convictions obtained in Michigan criminal cases, would have long ago decided to expressly overrule *Stewart*. Instead, the *Stewart* opinion has now stood for 24 years on its own, and for 8 years after the release of the *Gardner* decision.[5] It is long standing and correctly decided precedent that should be upheld under the general rules of stare decisis.

In *Gardner*, *supra*, this Court wrote that the rules of statutory construction required the Court to first consider the exact language of the habitual offender statutes, and apply that language if it is unambiguous, without any further consideration of legislative intent. In making its ruling, the *Gardner* majority opinion repeatedly stressed the precise words used by the Legislature, and in particular the words "any combination of" as used in MCL 769.11(1) and 769.12(1). Those statutes, in their relevant parts, read as follows:

> (1) If a person has been convicted of **any combination of 2 or more felonies or attempts to commit felonies,** whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:
>
> * * *
>
> (1) If a person has been convicted of **any combination of 3 or more felonies or attempts to commit felonies,** whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be

[5] The felony-firearm statute was enacted in 1976. While the statute has twice been amended, in 1990 PA 321 and 2015 PA 26, those amendments did not alter the initial language in section 227b(1). See *Stewart*, *supra* at 91, fn. 8.

> punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows: (Emphasis added).

The Court interpreted this precise language to conflict with the opinions in *Preuss*, *supra*, and *People v Stoudemire*, 429 Mich 262; 414 NW2d 693 (1987), which concluded the Michigan Legislature intended a same-incident or single-transaction test to be applied under the statutes – that multiple felonies occurring within the same criminal episode or transaction only count as a single prior felony conviction for the purposes of the habitual offender graduated sentencing scheme. The Court wrote that the Legislature's use of the term "any combination" of 2, 3 or more felonies demonstrated the Legislature intended that a combination of multiple felonies within a single incident counted as multiple felonies for subsequent sentencings:[6]

> Nothing in the statutory text suggests that the felony convictions must have arisen from separate incidents. To the contrary, the statutory language defies the importation of a same-incident test because it states that *any combination* of convictions must be counted. Indeed, *Stoudemire* and *Preuss* essentially acknowledged the clear import of the language.
>
> * * *
>
> In this case, we acknowledge the Legislature's explicit changes to the statutory language and, in doing so, by no means do we employ "a new view of statutory interpretation," as Justice Cavanagh contends. Post at 100 n. 12. To the contrary, we consider the statute's plain language, and it is difficult to imagine how the Legislature could possibly have written the statute to more clearly indicate that all prior convictions count than by stating that "[i]f a person has been convicted of *any combination of* 2 or more felonies or attempts to commit felonies ... and that person commits a subsequent felony within this state, the person shall be punished [as provided in this section]." MCL 769.11(1).

482 Mich at 51, 66.

[6] The *Gardner* Court held that within the single incident, the habitual offender statutes did not apply to permit enhanced sentences for a second, third, or further felony conviction arising out of that incident.

Holding that this precise language had to be applied as written, the *Gardner* majority found that the opinions in *Preuss* and *Stoudemire* improperly sought to discern the Legislature's intent in creating the current habitual offender sentencing scheme through other sources (legislative history, analogies to similar statutes in other jurisdictions, etc), and thus overruled both prior precedents.

In *Stewart, supra*, the Court disagreed with its prior opinion in *People v Sawyer*, 410 Mich 531; 302 NW2d 534 (1981), which held that for a second or subsequent felony-firearm conviction to count as a further conviction for the purposes of the graduated sentencing scheme under MCL 750.227b, the commission date of the second offense had to be subsequent to the date of the first conviction. The *Stewart* Court ruled that the date of the commission of the subsequent offense did not have to be after the date of the earlier conviction, but that the prior convictions, no matter the dates of the offenses, had to come from separate transactions or episodes to qualify as multiple convictions for the enhanced sentencing scheme. The Court discussed the *Preuss* and *Stoudemire* opinions dealing with the habitual offender laws, and found that while there was "no conflict between the interpretation given to the habitual offender statute in *Preuss* and the interpretation given to the felony-firearm statute in *Sawyer*," the *Sawyer* decision was wrong to require that all prior offenses be "neatly separated" by intervening convictions:

> Our statement in *Sawyer* that "a five-year term of imprisonment for a second conviction should only be imposed where the second offense is subsequent to the first conviction," 410 Mich at 536; 302 NW2d 534, should be understood to mean that a defendant may not be convicted as a repeat offender unless the prior conviction(s) precede the offense for which the defendant faces enhanced punishment.

> There is no requirement that all prior offenses be neatly separated by intervening convictions.
>
> As in *Sawyer* and *Preuss*, we hold that a defendant may be convicted of felony-firearm (third offense) if the third offense is preceded by two convictions of felony-firearm, **and both prior felony-firearm convictions have arisen from separate criminal incidents.**

441 Mich at 94-95. (Emphasis added).

The language of the felony-firearm statute reads very differently from that used by the Legislature in the habitual offender statutes. MCL750.227b(1) reads:

> (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, 227, 227a, or 230, is guilty of a felony and shall be punished by imprisonment for 2 years. Upon a second conviction under this subsection, the person shall be punished by imprisonment for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be punished by imprisonment for 10 years.

It is noteworthy that the Legislature did not employ the term "any combination of" felony-firearm convictions in this statute, as they did in the habitual offender statutes. In *Gardner*, the Court repeatedly emphasized that term as unambiguously signifying the Legislature intended to separately count all prior felony convictions for the purposes of habitual offender sentencing, whether or not all or any of those prior convictions arose from a single criminal episode. The fact the Legislature did not use that exact terminology, or like statement of intent, in the felony-firearm statute means that the intent of this graduated sentencing scheme is not obvious or unambiguous.

While it might be argued that the language of the felony-firearm statute is even more clear than that of the habitual offender statutes – that the first conviction results in two years, the

second in five, and the third or subsequent convictions result in ten years – that would mean that a strict application of the language would require this Court to hold that the sequence of those convictions is irrelevant. Thus, where three convictions for felony-firearm occur within the same case, each attached to a separate predicate felony, the defendant would have to be sentenced to two year, five year, and ten year sentences to precede the other felony sentences. Such a finding is not required by the *Gardner* decision, and in fact would directly conflict with that ruling, where the Court expressly held that multiple felony convictions occurring within the same case from the same criminal episode cannot be used as the foundation for application of the habitual offender sentencing scheme within that single case:

> In his only argument based on the text of the statute, Justice Cavanagh asserts that the statute's use of the phrase "subsequent felony" indicates that enhancement does not apply to simultaneous criminal acts. *Post* at 96–97. We agree that, if an offender is convicted and sentenced for two simultaneous felonies, neither simultaneous conviction may be used to enhance the sentence for the other under the habitual offender statutes. But Justice Cavanagh's extension of this point to imply a same-incident test misinterprets the statute's use of the word "subsequent."

482 Mich at 63.

It is unreasonable to conclude the Legislature intended that the graduated punishments in the felony-firearm statute would apply within a single case. Accordingly, what appears possible, if not expressly required, on an initial reading of the felony-firearm statute is not a rational interpretation of that statute.

The Court in *Gardner* held "it is difficult to imagine how the Legislature could possibly have written the statute to more clearly" show an intent that multiple felony convictions within a single episode count as multiple felonies for the purposes of the habitual offender statute given

their use of the term "any combination of." Had the Legislature similarly intended the felony-firearm statute to require that multiple convictions for felony-firearm in a prior case count as separate convictions, rather than merely one, they would have drafted the felony-firearm statute by using the same definitive term – "any combination of." Since no such term appears in the felony-firearm statute, this Court's interpretation of the habitual offender statutes does not mandate a similar construction of the felony-firearm language.

There is a logical and reasonable basis for this Court to treat multiple felony convictions within a single incident differently from multiple counts of felony-firearm within a single incident for the purposes of multi-conviction sentencing. Where there are multiple substantive felony convictions within a single case, those separate convictions demonstrate that the offender undertook separate and discrete acts, each of which supported a separate conviction. No one physical act of the offender violated separate criminal statutes. At trial, the prosecution thus would have to separately prove beyond a reasonable doubt the necessary elements of each felony.

On the other hand, the fact that multiple counts of felony-firearm result in multiple convictions in a single case commonly reflects only that the offender possessed a firearm during the incident, during which the other felonious acts occurred. It is not disputed that the possession of a single firearm during a sequence of felonious acts can legally and factually justify multiple counts of felony-firearm - one for each of the predicate underlying felonies. In nearly all such cases the offender did not possess a separate weapon in relation to each separate predicate felony – rather it was the possession of the same weapon that provided the basis for each felony-firearm charge related to each predicate felony. At trial, assuming the prosecution does prove the commission of

separate predicate felonies, all the prosecution must do in addition is prove the possession of a firearm during those felonies – an act generally shown by a single set of proofs.

On that basis, it is reasonable to assume that the Legislature, when it created the graduated sentencing scheme in the felony-firearm statute, meant to apply the second and third offender sentences only to offenders who once were found guilty of felony-firearm and then committed an additional act of felony-firearm in a subsequent incident. The Legislature created a strict sentencing scheme for the felony-firearm statute. Not only are the sentences determinate rather than indeterminate, but also there is no discretion for the trial court to impose any sentence but the mandatory term under the statute, and that term must run consecutive and prior to any term imposed for the predicate felony. This is a very different sentencing scheme than that set forth in the general habitual offender statutes, where the trial judge has discretion not to increase the punishment at all over the statutory maximums, and the sentence is not mandatorily consecutive to any other sentence.

It is reasonable to conclude the Legislature did not intend that the sentencing for a defendant skip directly from the two year mandatory term for a first offense to the mandatory ten year term for a third conviction, where the first two convictions occurred within the initial incident and the third conviction occurred during a second, subsequent incident. Instead, it is most likely the Legislature intended that where an offender serves a two year mandatory term (each two year term where there are multiple felony-firearm convictions in a single case run concurrently), he or she should be sentenced to the mandatory five year term the next time the offender again violates the statute, and then a ten year term if and when the offender violates the statute for the third or subsequent time.

A holding that *Stewart* be overruled in favor of a rule that is the equivalent to the decision in *Gardner* would vest the power to avoid the five year term entirely in the prosecution. Under the present law, it is common for prosecutors, if charging felony-firearm at all, to only charge a single count of felony-firearm in a case even where there are multiple predicate felonies committed. The prosecution understands that charging multiple felony-firearm counts will only result in concurrent two year terms, to run prior to the terms imposed for the predicate felonies. If *Stewart* is overruled, however, and the multiple felony-firearm convictions in the first case will be counted as separate convictions in subsequent cases, the prosecution will have an incentive to charge the multiple counts in the initial case, if multiple predicate felonies are also charged, for the sole purpose of insuring that if the defendant is ever again convicted of felony-firearm, the ten year mandatory sentence, rather than the five year term, will apply. Given the serious impact of a mandatory, consecutive, and determinate ten year sentence, it is unlikely the Legislature intended to invest such power in the prosecution.

In *Gardner, supra*, the majority focused on changes to the statutory language since the initial enactment of the habitual offender graduated sentencing scheme. In 1978, the Legislature amended the statutes, which were first enacted in 1927, at which time the Legislature first used the term "any combination of" prior felonies:

> Significantly, *Stoudemire* avoided the import of the statutory text, in part, by dismissing the Legislature's 1978 revisions of the text in 1978 PA 77. Before 1978, the relevant portion of MCL 769.11 stated: "A person who after having been twice convicted within this state of a felony or an attempt to commit a felony ... commits any felony within this state, is punishable upon conviction as [provided in this section]." (Emphasis added.) Despite the revisions, the *Stoudemire* majority nonetheless relied on its perceptions of the history of the original 1927 act. The Court explicitly recognized that "the phrase 'If a person has been convicted of 3 or more felonies,'

> arguably has a different import than the phrase 'A person who after having been 3 times convicted....' " *Stoudemire, supra* at 278, 414 NW2d 693. But the Court dismissed this significant change, concluding that "when considered in the context of the other changes made in the statute it is clear that the Legislature intended only to improve the statutes grammar, not to alter its underlying meaning."

482 Mich at 53.

In disagreeing with the dissenting opinions that overruling *Preuss* and *Stoudemire* would violate the principles of stare decisis, the *Gardner* majority specifically noted that the changes to the statutory language required a reevaluation of the current language, contrary to the analysis employed in those prior precedents:

> Justice Cavanagh also purports to rely on "this Court's consistent statements concerning the purpose of the habitual-offender statutes." *Post* at 97. He cites cases from 1929, the 1940s, and, most recently, 1970 and 1976. *Post* at 96, 97 n. 6, and 97. Yet, as Justice Cavanagh acknowledges, the Legislature amended the statutes in 1978. 1978 PA 77. He ignores the import of the 1978 revisions, as did the Court in *Stoudemire* and *Preuss*. Thus, he urges that "in more than 150 years, no Michigan court has ever held, until today, that convictions for multiple crimes committed in a single criminal transaction count as separate convictions for habitual-offender purposes." *Post* at 100, citing *People v Palm*, 245 Mich 396, 400; 223 NW 67 (1929). Justice Kelly similarly opines that the "1978 amendments did not alter the command that 'multiple convictions arising out of a single incident may count as only a single prior conviction under the statute....' " *Post* at 104. But, instead of explaining this conclusory statement, she merely cites *Preuss*. *Post* at 104.
>
> We reject the dissents' suggestions that this Court should divine legislative intent not from the Legislature's enactments, but from precedent of this Court that preexisted those enactments.
>
> * * *
>
> Both dissents' analyses would essentially require the Legislature to explain to this Court's satisfaction its reasons for changing the statutory text. The Legislature has no such duty to us

> and, because its text is clear, it is irrelevant whether the legislators concluded that this Court misinterpreted the pre–1978 statutes in its previous decisions or, instead, that a new policy for counting prior felonies was preferable. Significantly, various legislators' reasons for enacting the text may have differed and may have been rooted in either of these conclusions. But their agreed-on choice of language is controlling. If that language is perfectly forthright, our task is simply to implement it. We reject the implications of the dissents' views, which would ultimately require the Legislature, when amending laws, to add redundant explanations for its otherwise plain language such as: "By X, we mean X. We do not mean the Supreme Court's previous interpretations of Y."
>
> We express no opinion regarding the correctness of any court's interpretations of the pre–1978 versions of the statutes. Questions concerning earlier versions of the text are not before us. Moreover, to whatever extent courts correctly divined past legislatures' intents using previously enacted language, those intents should not guide our interpretation of the unambiguous language of the current versions of the statutes; the acts of past legislatures do not bind the power of successive legislatures to enact, amend, or repeal legislation. *Studier v Michigan Pub School Employees' Retirement Bd*, 472 Mich 642, 660; 698 NW2d 350 (2005). In this case, we acknowledge the Legislature's explicit changes to the statutory language and, in doing so, by no means do we employ "a new view of statutory interpretation," as Justice Cavanagh contends.

*Id.* at 64-66.

In regards to the felony-firearm statute, however, there has been no post-enactment legislative change to the relevant language of subsection (1). The interpretation of that language by this Court in *Stewart* was not of a prior or amended version of the law, but rather of the precise language that currently appears in the statute. Accordingly, that opinion has significantly stronger stare decisis implications than did the decisions in *Preuss* and/or *Stoudemire*.

This Court should find that under those principles, the doctrine of stare decisis leads to the conclusion that the precedent set 24 years ago in *Stewart* should be retained. See *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000); *Rowland v Washtenaw Co Rd Comm*, 477 Mich

197; 731 NW2d 41 (2007). Initially, the Court should find, as argued above, that the *Stewart* decision was correctly decided, and thus there is no basis for overruling that precedent. If the opposite conclusion is reached, the Court should nevertheless uphold *Stwewart*, as it remains workable and easy to administer, there has been unwavering reliance on that rule since at least 1992, and no changes in law or facts have undermined the basis for the decision (as compared to the statutory amendments at the heart of the *Gardner* decision). *Robinson, supra*. In addition, the United States Supreme Court has written that stare decisis has particular strength in the area of statutory construction, as legislatures have the power and authority to amend or repeal laws if they find court interpretations of those laws are inconsistent with the legislative intent behind their enactments:

> The Court has said often and with great emphasis that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 494, 107 S.Ct. 2941, 2957, 97 L.Ed.2d 389 (1987). Although we have cautioned that "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision," *Boys Markets, Inc. v. Retail Clerks*, 398 U.S. 235, 241, 90 S.Ct. 1583, 1587, 26 L.Ed.2d 199 (1970), it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion." The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton). See also *Vasquez v. Hillery*, 474 U.S. 254, 265, 106 S.Ct. 617, 624, 88 L.Ed.2d 598 (1986) (stare decisis ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").
>
> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. See *Patterson v. McLean Credit Union, supra*, 485 U.S., at 617–618, 108 S.Ct., at 1420–1421 (citing cases). Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467

> U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. **Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.**

*Patterson v McLean Credit Union*, 491 US 164, 172–173; 109 S Ct 2363; 105 L Ed 2d 132 (1989). (Emphasis added).

As the precise language used by the Michigan Legislature in MCL 750.227b does not mirror the language used in the habitual offender statutes, that language does not unambiguously demonstrate a legislative intent that multiple convictions for felony-firearm in a single case count as multiple convictions for the purposes of a subsequent violation of the statute, and there have been no problems with administering the statute cited by Plaintiff-Appellant, this Court should distinguish the *Gardner* decision from the case at bar, and, under the principles of stare decisis, reaffirm the precedent of *People v Stewart, supra*.

## RELIEF SOUGHT

Defendant-Appellee asks this Honorable Court to deny the application for leave to appeal.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

BY: /s/ Peter Jon Van Hoek
_____

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Date: December 20, 2016.

# APPENDIX A

# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDMUND WILSON,

Defendant-Appellant.

UNPUBLISHED
May 10, 2016

No. 324856
Macomb Circuit Court
LC No. 2009-002637-FC

Before: MURPHY, P.J., and CAVANAGH and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and two counts of unlawful imprisonment, MCL 750.349b. Defendant was sentenced to 10 years' imprisonment for the felony-firearm conviction as a third felony-firearm offender, and 100 to 180 months' imprisonment for the unlawful imprisonment convictions.[1] We affirm defendant's convictions but remand for correction of the judgment of sentence to reflect a term of five years' imprisonment for defendant's felony-firearm conviction and for reconsideration of defendant's unlawful imprisonment sentences.

Defendant first argues that he was denied his right to a speedy trial. We disagree. "The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo." *People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009) (citations omitted).

"[A] defendant's right to a speedy trial is guaranteed by the United States and Michigan Constitutions." *People v Rivera*, 301 Mich App 188, 193; 835 NW2d 464 (2013), citing US Const, Am VI; Const 1963, art 1, § 20. See also MCL 768.1 (codifying the right to a speedy trial). No fixed number of days of delay exists after which the right to a speedy trial is violated. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). "Whether an accused's right to a

[1] The jury found defendant not guilty of the additional charges of second-degree murder, MCL 750.317, and assault with intent to do great bodily harm, MCL 750.84.

speedy trial is violated depends on consideration of four factors: (1) the length of delay, (2) the reason for delay, (3) the defendant's assertion of the right, and (4) the prejudice to the defendant." *Rivera*, 301 Mich App at 193 (quotation marks omitted). "Following a delay of eighteen months or more, prejudice is presumed, and the burden shifts to the prosecution to show that there was no injury." *Williams*, 475 Mich at 262. "[A] presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial." *Id.* (quotation marks omitted). "In assessing the reasons for delay, this Court must examine whether each period of delay is attributable to the defendant or the prosecution." *Waclawski*, 286 Mich App at 666. Delays that inhere in the court system, such as docket congestion, are technically attributable to the prosecution but are given a neutral tint and assigned only minimal weight in determining whether a speedy trial violation occurred. *Williams*, 475 Mich at 263.

We note that, before trial, defendant filed in federal district court a habeas corpus petition raising his speedy trial claim. See *Wilson v Michigan*, unpublished order of the United States District Court for the Eastern District of Michigan, entered July 17, 2014 (Docket No. 14-12490), 2014 WL 3543305. On July 17, 2014, the federal district court dismissed defendant's petition and reasoned, in relevant part, that much of the delay was due to interlocutory appeals and that defendant's case had been steadily progressing in state court. *Id.* at 2-3.

On September 8, 2014, the trial court in the present case denied defendant's motion to dismiss for violation of his right to a speedy trial. In addressing the reasons for the delay, the trial court summarized the relevant proceedings as follows:

> On September 6, 2011, the Supreme Court denied the prosecutor's application for leave to appeal the Court of Appeals's May 10, 2011 decision [reversing defendant's earlier convictions in this case from a 2009 trial]. Moreover, on September 9, 2011, the Circuit Court file was returned from the Supreme Court. A pre-trial conference was held in November 2011. The Circuit Court denied defendant's prior motions to dismiss for violation of the 180-day trial rule on February 16, 2012 and March 1, 2012. Defendant filed a delayed application for leave to appeal the denial of his original motion to dismiss, which was denied by the Court of Appeals on April 18, 2012. On July 6, 2012, the Circuit Court granted defendant's motion to dismiss the felony murder charge. Thereafter, on July 16, 2012, the Court of Appeals stayed this matter pending appeal. On August 13, 2012, the trial court entered an order placing this matter on the inactive docket due to the stay. That order stated that "[i]t appears that no further progress in this cause will be possible because of [the stay]."
>
> Prior to the stay, defendant filed numerous motions, including, but not limited [to], the motions to dismiss for violation of the 180-day trial rule, a motion for [sic] dismiss for failure to arraign, discovery motions, a motion for bond reduction, a request for an investigator, for additional scientific experts, and to dismiss the felony murder charge. Further, on April 18, 2012, the Court granted defendant's motion to adjourn the April 24, 2012 trial date to July 17, 2012 to allow defendant time for trial preparation.

> On November 15, 2012, the Court of Appeals reversed the Circuit Court's decision. The Supreme Court issued its decision on June 18, 2014 and its corresponding order reversing the Court of Appeals's decision and remanding the matter to this Court for further proceedings was entered on July 16, 2014. Further, on July 24, 2014, these proceedings were removed from the Circuit Court's inactive docket. On July 30, 2014, the Circuit Court received the Supreme Court's order and the file was returned from the Supreme Court. Shortly thereafter, on August 4, 2014, the Court took defendant's pending motions under advisement. On August 21, 2014, a pre-trial conference was held. A pre-trial conference/hearing is set for September 8, 2014.
>
> Thus, this Court was precluded from proceeding with this matter pending appeal and acted promptly after the Supreme Court's decision was entered. It should be noted that the federal court's decision, as discussed above, primarily attributed the delay to interlocutory appeals and noted that this case has been steadily progressing in state court. Further, some of the delay can be attributed to defendant inasmuch as he filed numerous motions and requested that the trial date be adjourned prior to the stay. Under the totality of circumstances, this Court sees no evidence that the prosecution is substantially to blame for the delays in this case or that they were unwarranted. [Quotation marks and citation omitted; alterations in original.]

The trial court noted that the prosecutor did not dispute that defendant had asserted his right to a speedy trial numerous times throughout the proceedings. The trial court found that defendant's general allegations of prejudice were insufficient to establish that he was denied his right to a speedy trial. Balancing the factors, the trial court concluded that defendant's speedy trial right was not violated.

We agree with the trial court's analysis. First, with respect to the length of delay, the parties agree that the relevant period of delay began on September 6, 2011, which was the date that our Supreme Court denied leave to appeal, see *People v Wilson*, 490 Mich 861 (2011) (*Wilson II*), from this Court's reversal of defendant's earlier convictions, see *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued May 10, 2011 (Docket No. 296693), pp 1-3 (*Wilson I*), and ended on September 24, 2014, the date that defendant's second trial began. Because the delay exceeded 18 months, prejudice is presumed and an inquiry must be made into the other factors in order to determine whether a speedy trial violation occurred. See *Williams*, 475 Mich at 262.

Regarding the reasons for delay, it is undisputed that the vast majority of delay, approximately two years, is attributable to an interlocutory appeal arising from the dismissal of a charge of first-degree felony murder, MCL 750.316(1)(b). The trial court dismissed the felony murder charge on July 6, 2012. On July 12, 2012, the prosecutor filed an interlocutory application for leave to appeal in this Court. On July 16, 2012, this Court granted the prosecutor's application for leave to appeal and stayed further proceedings in the trial court pending the resolution of the appeal. *People v Wilson*, unpublished order of the Court of Appeals, entered July 16, 2012 (Docket No. 311253). On November 15, 2012, this Court issued an opinion reversing the trial court's order, reinstating the felony murder charge, and remanding

the case to the trial court for further proceedings. *People v Wilson*, unpublished opinion per curiam of the Court of Appeals, issued November 15, 2012 (Docket No. 311253), pp 1-3 (*Wilson III*), reversed 496 Mich 91 (2014). On January 9, 2013, defendant filed an application for leave to appeal in our Supreme Court. On May 24, 2013, our Supreme Court granted defendant's application for leave to appeal. *People v Wilson*, 494 Mich 853 (2013). On June 18, 2014, our Supreme Court issued an opinion holding that double jeopardy precluded recharging defendant with felony murder because he had previously been acquitted of the predicate felony; the Supreme Court therefore reversed this Court's decision and remanded the case to the trial court for further proceedings. *People v Wilson*, 496 Mich 91, 108; 852 NW2d 134 (2014) (*Wilson IV*). Our Supreme Court entered its corresponding order returning the matter to the trial court on July 16, 2014.

The two-year period of delay related to the interlocutory appeal is not weighed in favor of defendant's speedy trial claim.

> Given the important public interests in appellate review, it hardly need be said that an interlocutory appeal by the Government ordinarily is a valid reason that justifies delay. In assessing the purpose and reasonableness of such an appeal, courts may consider several factors. These include the strength of the Government's position on the appealed issue, the importance of the issue in the posture of the case, and – in some cases – the seriousness of the crime. For example, a delay resulting from an appeal would weigh heavily against the Government if the issue were clearly tangential or frivolous. Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal. [*United States v Loud Hawk*, 474 US 302, 315-316; 106 S Ct 648; 88 L Ed 2d 640 (1986) (citations omitted).]

Although the prosecutor did not ultimately prevail in our Supreme Court on the appealed issue concerning whether double jeopardy barred retrial on the felony murder charge, the prosecutor's position was not clearly tangential or frivolous. Indeed, the prosecutor's argument was sufficiently strong that this Court ruled in favor of the prosecutor, see *Wilson III*, unpub op at 1-3, and three dissenting justices of our Supreme Court also agreed with the prosecutor's position, see *Wilson IV*, 496 Mich at 132 (MARKMAN, J., dissenting). Defendant has not demonstrated that the prosecutor acted in bad faith or had a dilatory purpose in pursuing the interlocutory appeal. See *Loud Hawk*, 474 US at 316 (noting that the defendant had made no showing of bad faith or dilatory purpose on the part of the prosecutor). The issue whether double jeopardy barred retrial on the felony murder charge was an important issue in the posture of the case given that it was the most serious charge being pursued and the trial court's ruling prevented prosecution on that charge. Likewise, the seriousness of the crime of felony murder is beyond dispute.

It is also notable that the appellate delay during the period from this Court's issuance of its opinion on November 15, 2012, until the case returned to the trial court in July of 2014, is due to defendant's decision to pursue in our Supreme Court an interlocutory appeal of this Court's decision.

> In that limited class of cases where a pretrial appeal by the defendant is appropriate, delays from such an appeal ordinarily will not weigh in favor of a defendant's speedy trial claims. A defendant with a meritorious appeal would bear the heavy burden of showing an unreasonable delay caused by the prosecution in that appeal, or a wholly unjustifiable delay by the appellate court. [*Loud Hawk*, 474 US at 316 (citation omitted).]

Defendant has not shown that the prosecutor caused an unreasonable delay or that there was a wholly unjustifiable delay by our Supreme Court. Accordingly, the delay attributable to the interlocutory appeal is not weighed in favor of defendant's speedy trial claim.

Moreover, most of the period of delay that preceded and followed the interlocutory appeal is either attributable to defendant or given only minimal weight because of delays inherent in the court system. The prosecutor concedes that there was a two-week adjournment at the prosecutor's request and a one-month delay attributable to the trial court's unavailability and the reassignment of the initial trial judge to the Family Division of the Macomb Circuit Court. But by far most of the delays appear to be attributable to motions or requests by defendant.

In particular, at a November 15, 2011 pretrial conference, defendant, who was then represented by an attorney, requested through defense counsel a new pretrial conference in order to have more time to review discovery material and to prepare defense motions. At a December 13, 2011 pretrial conference, defense counsel again said that he was in the process of reviewing discovery items and would need to review some transcripts that the prosecutor was supposed to provide; defense counsel indicated that defendant wanted counsel to look into a legal issue and suggested coming back in January to set a trial date and address any pretrial motions. At a January 19, 2012 hearing, defendant asked the trial court to appoint him a new attorney and indicated that otherwise defendant might represent himself; the trial court agreed to appoint a new lawyer for defendant. At a February 16, 2012 pretrial conference, it was revealed that defendant was unhappy with the new attorney that the court had appointed for him, and defendant indicated that he wished to represent himself; defendant also indicated that he wanted to file a motion for further discovery and requested appointments of a private investigator, an independent medical examiner, and a crime reconstructionist to assist in the defense. At a March 1, 2012 pretrial hearing, the trial court asked defendant if he would be ready for trial the following week or the week after that, and defendant indicated that he was not ready for trial at those times; defendant also indicated that he planned to file a motion to remove the trial judge. At an April 18, 2012 pretrial hearing, defendant requested an adjournment of at least 90 days so he could have more time to prepare for trial. At defendant's request, on April 18, 2012, the trial court adjourned the trial from April 24, 2012 to July 17, 2012. At a May 4, 2012 pretrial hearing, defendant again pursued a motion regarding further discovery and requested bond. Defendant also pursued various motions at hearings held on July 9, 2012; July 12, 2012; July 21, 2014; August 21, 2014; and September 8, 2014.

In short, the record reflects that the bulk of the delay before and after the interlocutory appeal is attributable to defendant given his numerous motions, requests for adjournment, and requests for new appointed counsel. Any remaining adjournments appear to be inherent to the court system and thus, while technically attributable to the prosecution, are assigned only minimal weight. *Williams*, 475 Mich at 263.

Next, as the trial court noted, it is undisputed that defendant made numerous assertions of his speedy trial right.

Defendant did not suffer any prejudice to his defense. "Prejudice to the defense is the more serious concern [than prejudice to the person], because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Williams*, 475 Mich at 264 (quotation marks removed). Defendant concedes on appeal that there are no specific witnesses that have become unavailable and no specific documents that have been lost as a result of the delay. See *Waclawski*, 286 Mich App at 669 (concluding that the defendant's defense was not prejudiced where there was "no indication that a potential defense witness was lost or that other exculpatory evidence was misplaced during the delay."). Defendant contends that he has suffered prejudice to his person because he endured anxiety from facing a murder charge of which, defendant claims, he has now been cleared. The mere fact that defendant was not ultimately convicted of murder does not establish that his incarceration pending trial on murder and other charges comprised unfair prejudice to his person. Anxiety alone is insufficient to establish a speedy trial violation. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Defendant was ultimately convicted of three felonies and has received credit for the time that he was incarcerated before trial.[2]

We conclude that, although the three-year delay is presumptively prejudicial and defendant asserted his speedy trial right, the reasons for delay do not weigh in favor of his claim, and his ability to prepare a defense was not prejudiced. Therefore, defendant's right to a speedy trial was not violated. See *Waclawski*, 286 Mich App at 669 (finding no speedy trial violation where, although the length of the delay was presumptively prejudicial and the defendant asserted his speedy trial right, the defendant's ability to prepare a defense was not prejudiced and the reasons for delay weighed against the defendant).

Defendant next argues that the trial court erred in sentencing him to 10 years' imprisonment as a third felony-firearm offender. We agree. This issue presents a question of statutory interpretation, which is reviewed de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

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[2] Defendant alludes to the fact that, after this Court reversed his earlier convictions in 2011, he remained incarcerated with the Department of Corrections and was not transferred to the Macomb County Jail until March of 2014. If defendant is suggesting that this fact somehow weighs in favor of his speedy trial claim by showing prejudice to his person, then his argument is disingenuous. At pretrial hearings in 2012, the prosecutor repeatedly urged that defendant be transferred from the Department of Corrections to the Macomb County Jail, and defendant emphatically resisted this suggestion, insisting that he wished to remain in a Department of Corrections facility because it had a better law library than the Macomb County Jail. Defendant repeatedly opposed any efforts to move him from the Department of Corrections facility to the Macomb County Jail. In any event, defendant cites no authority indicating that his incarceration in the Department of Corrections rather than in the Macomb County Jail affects the determination whether he suffered prejudice to his person for the purpose of a speedy trial claim.

MCL 750.227b(1) provides:

> A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, 227, 227a, or 230, is guilty of a felony and shall be punished by imprisonment for 2 years. Upon a second conviction under this subsection, the person shall be punished by imprisonment for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be punished by imprisonment for 10 years.

In *People v Stewart*, 441 Mich 89, 95; 490 NW2d 327 (1992), our Supreme Court held "that a defendant may be convicted of felony-firearm (third offense) if the third offense is preceded by two convictions of felony-firearm, and both prior felony-firearm convictions have arisen from separate criminal incidents." In requiring that the two prior felony-firearm convictions arise from separate criminal incidents, the Supreme Court in *Stewart* relied in relevant part on its earlier opinion in *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990), overruled by *People v Gardner*, 482 Mich 41 (2008), which had interpreted the general habitual offender statutes. See *Stewart*, 441 Mich at 93-95. The Supreme Court noted in *Stewart*: "We said in *Preuss* that the habitual offender statute 'requires only that the fourth offense be preceded by three convictions of felony offenses, and that each of those three predicate felonies arise from separate criminal incidents.' " *Stewart*, 441 Mich at 94, quoting *Preuss*, 436 Mich at 717.

In *Gardner*, 482 Mich at 44, our Supreme Court overruled *Preuss* because the holding in *Preuss* contradicted the language of the general habitual offender statutes. Summarizing its decision, the Supreme Court stated in *Gardner*:

> Michigan's habitual offender laws clearly contemplate counting *each* prior felony conviction separately. The text of those laws does not include a same-incident test. This Court erred by judicially engrafting such a test onto the unambiguous statutory language. Accordingly, we overrule *Preuss* . . . . [*Gardner*, 482 Mich at 68.]

Our Supreme Court in *Gardner* did not interpret the felony-firearm statute or overrule *Stewart*.

In deciding to sentence defendant to 10 years' imprisonment as a third felony-firearm offender, the trial court reasoned that, because *Stewart* relied on *Preuss*, and because *Preuss* was overruled in *Gardner*, the separate criminal incident requirement in *Stewart* is no longer controlling. But the trial court and this Court are bound to follow *Stewart* unless and until it is overruled by our Supreme Court. "[O]nly [our Supreme] Court has the authority to overrule one of its prior decisions. Until [our Supreme] Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). Although the rationale for the holding in *Stewart* has arguably been called into question by *Gardner*, the fact remains that *Gardner* did not overrule *Stewart* or interpret the felony-firearm statute that was addressed in *Stewart*. Therefore, only the Supreme Court can decide whether *Stewart* should, like *Preuss*, be overruled. *Paige*, 476 Mich at 524.

In this case, it is undisputed that defendant's two prior felony-firearm convictions arose from the same criminal incident, which occurred on January 4, 1997. Because defendant's two prior felony-firearm convictions did not arise from separate criminal incidents, *Stewart* precludes sentencing him as a third felony-firearm offender. See *Stewart*, 441 Mich at 95.

We conclude that the proper remedy is to remand the case to the trial court for correction of the judgment of sentence to reflect a lesser five-year term for defendant's felony-firearm conviction as a second offender. See MCL 750.227b(1) (providing for a five-year term of imprisonment upon a second felony-firearm conviction). A full resentencing hearing is not necessary because the required modification is ministerial. The trial court's error was not a product of inaccurate information but was due to a misunderstanding of the law; the appropriate sentence for this offense is not discretionary; and no due process concerns are implicated. Cf., generally, *People v Miles*, 454 Mich 90, 100-101; 559 NW2d 299 (1997). Indeed, defendant does not request a full resentencing but instead asks for a remand with instructions to the trial court to amend the judgment of sentence to correct the felony-firearm sentence. Nonetheless, if the trial court on remand determines that resentencing is required for the unlawful imprisonment convictions, as discussed later in this opinion, then the trial court may include the felony-firearm resentencing in that hearing, even though, as discussed, the appropriate sentence for felony-firearm is not discretionary.

Defendant next argues that the trial court made a scoring error in assessing points for Offense Variables (OVs) 3 and 7. We disagree. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (citations omitted). "When calculating the sentencing guidelines, a court may consider all record evidence, including the contents of a [presentence investigation report]." *People v Thompson*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 318128); slip op at 3.

OV 3 addresses physical injury to the victim. MCL 777.33(1); *People v Laidler*, 491 Mich 339, 343; 817 NW2d 517 (2012). A trial court must assess 100 points under OV 3 "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b); *Laidler*, 491 Mich at 343. For the purpose of OV 3, a victim includes any person harmed by the defendant's criminal actions, *id.* at 349 n 6; a victim is not limited to the victim of the charged offense, *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003). To assess points under OV 3, factual causation is required, in that the victim would not have died but for the defendant's criminal conduct. *Laidler*, 491 Mich at 345. The defendant's actions need not constitute the only cause of the death. *Id.* at 346.

"Offense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable." *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009). OV 3 does not provide for consideration of conduct that occurs after completion of the sentencing offense. See MCL 777.33. Therefore, the scoring of OV 3 must be limited to the circumstances of the sentencing offenses, i.e., unlawful imprisonment. Unlawful imprisonment is an ongoing offense; all of a defendant's actions during the time that the victim is

restrained constitute conduct that occurred during the offense of unlawful imprisonment. See *People v Chelmicki*, 305 Mich App 58, 70-72; 850 NW2d 612 (2014). A trial court may properly consider all of a defendant's conduct during the sentencing offense. *Id.* at 72. In sentencing a defendant, a trial court is permitted to consider facts underlying an acquittal, *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992), and need only find facts to support its scoring decisions by a preponderance of the evidence, *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).

In recommending a 100-point score for OV 3, the presentence investigation report noted: "Although the defendant was found not guilty in the murder of Kenyetta Williams, he created the circumstances that ultimately led to the death of Mr. Williams." In assessing 100 points for OV 3, the trial court stated:

> I'm ready to rule on OV3. OV3 is scored correctly in the court's opinion. No question that the, even though the Defendant was not –
>
> He was found not guilty of the murder of Kenyetta Williams, the Court after hearing all the testimony does think that he created the circumstances that led to the death of Mr. Williams. So OV3 is properly scored. Let's move on.

The trial court properly assessed 100 points for OV 3. The sentencing offenses were two counts of unlawful imprisonment. The victims of those offenses, Justina Horton and Jasmine Horton, remained bound by duct tape in another room of the house when defendant confronted Katherine Horton and Williams in the front of the house and Williams was shot and killed. The unlawful imprisonment offenses thus remained ongoing when Williams was shot, and defendant's actions in the front of the house may be considered in scoring the offense variables. See *Chelmicki*, 305 Mich App at 70-72. Although Williams was not the victim of the sentencing offenses of unlawful imprisonment, he nonetheless was a victim for the purpose of OV 3 because he was harmed by defendant's criminal acts. See *Laidler*, 491 Mich at 349 n 6; *Albers*, 258 Mich App at 593. Even if Williams was shot in a struggle or in self-defense, defendant's criminal acts were a factual cause of Williams's death. Defendant used the firearms to commit the sentencing offenses by pointing the weapons at Justina and Jasmine, and he then pointed and used the same weapons when he confronted Katherine and Williams while Justina and Jasmine remained restrained. If defendant had not used these weapons in committing the crimes, Williams would not have been killed. Hence, the trial court did not err in scoring OV 3.

OV 7 addresses aggravated physical abuse. MCL 777.37(1); *Hardy*, 494 Mich at 439. On the date of the crimes in this case, OV 7 required a score of 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(1)(a).[3] In scoring OV

[3] Effective January 5, 2016, MCL 777.37(1)(a) was amended to require a 50 point score if "[a] victim was treated sadism, torture, excessive brutality or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" See 2015 PA

7, a court must count as a victim each person who was placed in danger of injury or loss of life. MCL 777.37(2); *People v Hunt*, 290 Mich App 317, 323; 810 NW2d 588 (2010). For the purpose of OV 7, " 'sadism' means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). OV 7 may be scored on the basis of emotional or psychological abuse; physical abuse is not required. *People v Mattoon*, 271 Mich App 275, 276; 721 NW2d 269 (2006).

In *Hardy*, 494 Mich at 440, our Supreme Court addressed the fourth category for which 50 points may be assessed under OV 7, i.e., "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). The *Hardy* Court "conclude[d] that it is proper to assess points under OV 7 for conduct that was intended to make a victim's fear or anxiety greater by a considerable amount." *Hardy*, 494 Mich at 441. "The relevant inquiries are (1) whether the defendant engaged in conduct beyond the minimum required to commit the offense; and, if so, (2) whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount." *Id.* at 443-444. The Court found that racking a shotgun during a carjacking to make the victim fear an imminent violent death supported an assessment of 50 points for OV 7. *Id.* at 445. Also, threatening and striking victims with what appeared to be a sawed-off shotgun went beyond what was necessary to commit an armed robbery and was intended to increase the victims' fear by a considerable amount, thus supporting a 50-point assessment for OV 7. *Id.* at 446-447. In light of *McGraw*, a sentencing court may consider only conduct that occurred during the criminal offense for the purpose of scoring OV 7. *Thompson*, ___ Mich App at ___; slip op at 4-5.

The presentence investigation report explained the recommendation of assessing 50 points for OV 7 as follows:

> OV7 notes the victim was treated with sadism, torture, excessive brutality or conduct to substantially increase the fear and anxiety the victims suffered from the offense. Accordingly, the Probation Department scored 50 points. Justina and Jasmine Howard informed investigators they experienced fear and anxiety when the defendant held them at gunpoint and later duct-taped them. Jasmine Horton informed investigators that she believed the defendant would ultimately shoot her in the back of the head. The fear and anxiety of the victims was further increased when they heard the gunshots that killed Kenyetta Williams.

In addressing OV 7 at sentencing, the prosecutor noted that defendant went into the basement of the home, pointed guns at Justina and Jasmine, duct-taped them, and had them get on their stomachs. Jasmine thought she was going to be shot in the head. Defendant then escorted the girls to the main floor of the house and had them sit on a couch while he waited for Katherine and Williams to arrive; defendant then shot Williams in the girls' presence. The prosecutor also noted that Katherine and Williams could be counted as victims for the purpose of OV 7, and that Williams lost his life and Katherine sustained injuries to her face from fighting with defendant. The prosecutor continued:

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137. A sentence must be imposed in accordance with the version of the guidelines in effect when the crime was committed. See *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007).

> A big part of offense variable 7 is sadism, conduct as to subject a victim to extreme or prolonged pain or humiliation.
>
> This entire incident was to humiliate and to cause suffering to Katherine Horton and Kenyetta Williams for their perceived transgression against the Defendant.

The trial court asked the probation officer to comment on OV 7, and the probation officer stated:

> Your Honor, per the author of the [presentence investigation] report, OV-7 notes the victim was treated with sadism, torture, or excessive brutality based on the investigator's report. These two individuals experienced fear and anxiety when the defendant held them at gun point and later duct –aped [sic] their mouth and hand [sic].

The trial court then stated: "For the argument made by the people and the probation department, the Court is going, the Court finds OV-7 was properly scored."

The trial court properly assessed 50 points for OV 7. There was more than ample evidence that defendant engaged in conduct beyond the minimum necessary to commit the offense of unlawful imprisonment, and that the conduct was designed to make the victims' fear or anxiety greater by a considerable amount. Defendant went into the basement where Justina and Jasmine were sleeping, pointed guns at them, ordered them to lie on their stomachs, bound their hands with duct tape, and put duct tape on their mouths. Jasmine feared that she would be shot in the back of the head. He then ordered the girls upstairs, removed the duct tape from their mouths but not their hands, and had them sit in a back room while he waited for their mother, Katherine, and her boyfriend, Williams, to arrive home. The girls were later subjected to hearing defendant confront Katherine and Williams in the front of the house while the girls remained bound by duct tape in the back room. The girls heard the sounds of defendant striking Katherine and the gunshots that killed Williams, which increased their fear and anxiety. The girls screamed during the incident. In addition, Williams and Katherine may be counted as victims because they were placed in danger of injury or loss of life. See MCL 777.37(2); *Hunt*, 290 Mich App at 323. Williams was killed from gunshot wounds, and Katherine sustained injuries to her face from being struck by defendant with a gun. The unlawful imprisonment offense remained ongoing during this incident because the girls were still confined in the back room, and defendant's conduct thus occurred during the sentencing offenses. See *Chelmicki*, 305 Mich App at 70-72. Hence, the trial court did not err in assessing 50 points for OV 7.

Defendant next argues that a Sixth Amendment violation occurred because judicial fact-finding in the scoring of OVs 3, 4, 7, and 10 increased his minimum sentencing guidelines range. We agree. A Sixth Amendment challenge presents a question of constitutional law that is reviewed de novo. *People v Lockridge*, 498 Mich 358, 373; 870 NW2d 502 (2015).

In *Lockridge*, 498 Mich at 364, our Supreme Court held that Michigan's sentencing guidelines are constitutionally deficient under the Sixth Amendment to the extent that "the guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines

minimum sentence range, i.e. the 'mandatory minimum' sentence under *Alleyne* [*v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013)]." As a remedy for this constitutional violation, our Supreme Court "sever[ed] MCL 769.34(2) to the extent that it makes the sentencing guidelines range as scored on the basis of facts beyond those admitted by the defendant or found by the jury beyond a reasonable doubt mandatory." *Lockridge*, 498 Mich at 364. The Court also struck "down the requirement in MCL 769.34(3) that a sentencing court that departs from the applicable guidelines range must articulate a substantial and compelling reason for that departure." *Id.* at 364-365. The Court held "that a guidelines minimum sentence range calculated in violation of *Apprendi* [*v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000),] and *Alleyne* is advisory only and that sentences that depart from that threshold are to be reviewed by appellate courts for reasonableness." *Lockridge*, 498 Mich at 365. Courts must continue to determine the applicable guidelines range and take it into account at sentencing. *Id.*

For cases that were held in abeyance for *Lockridge*, most of which involved challenges that were not preserved in the trial court, our Supreme Court held that a defendant's Sixth Amendment right is impaired if the "facts admitted by a defendant or found by the jury verdict were *insufficient* to assess the minimum number of OV points necessary for the defendant's score to fall in the cell of the sentencing grid under which he or she was sentenced." *Lockridge*, 498 Mich at 395. "[A]ll defendants (1) who can demonstrate that their guidelines minimum sentence range was actually constrained by the violation of the Sixth Amendment and (2) whose sentences were not subject to an upward departure can establish a threshold showing of the potential for plain error sufficient to warrant a remand to the trial court for further inquiry." *Id.* "[I]n cases in which a defendant's minimum sentence was established by application of the sentencing guidelines in a manner that violated the Sixth Amendment, the case should be remanded to the trial court to determine whether that court would have imposed a materially different sentence but for the constitutional error." *Id.* at 397. Such remands are warranted only in cases in which the defendant was sentenced on or before July 29, 2015, the date of the *Lockridge* decision. *Id.*[4] On remand,

> a trial court should first allow a defendant an opportunity to inform the court that he or she will not seek resentencing. If notification is not received in a timely manner, the court (1) should obtain the views of counsel in some form, (2) may but is not required to hold a hearing on the matter, and (3) need not have the defendant present when it decides whether to resentence the defendant, but (4) must have the defendant present, as required by law, if it decides to resentence the defendant. Further, in determining whether the court would have imposed a materially different sentence but for the unconstitutional constraint, the court should consider only the circumstances existing at the time of the original sentence. [*Id.* at 398 (quotation marks and citations omitted).]

[4] For defendants sentenced after the *Lockridge* decision, traditional plain-error review will apply. *Lockridge*, 498 Mich at 397.

In the present case, defendant preserved his *Lockridge* issue by raising it at sentencing. See *People v Steanhouse*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 318329); slip op at 21, lv pending. In *People v Stokes*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 321303); slip op at 9-10, lv pending, this Court explained that a preserved *Lockridge* error is not structural and is therefore subject to the harmless beyond a reasonable doubt standard. This Court further held that in order to determine whether the preserved *Lockridge* error in *Stokes* was harmless, the remand procedure described in *Lockridge* must be followed. *Id.* at 10. That is, the remand procedure described in *Lockridge* applies to both preserved and unpreserved pre-*Lockridge* sentencing errors. *Id.* at 11.

Defendant argues that there was judicial fact-finding in the scoring of OVs 3, 4, 7, and 10. We agree. The prosecutor confesses error on this defense argument.

As discussed, OV 3 addresses physical injury to the victim. MCL 777.33(1); *Laidler*, 491 Mich at 343. A trial court must assess 100 points under OV 3 "if death results from the commission of a crime and homicide is not the sentencing offense." MCL 777.33(2)(b); *Laidler*, 491 Mich at 343. The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning the death of a victim. See MCL 750.227b; MCL 750.349b. The trial court's assessment of 100 points for OV 3 was thus based on judicial fact-finding.

OV 4 addresses psychological injury to a victim. MCL 777.34(1); *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012). OV 4 requires a 10 point assessment if "[s]erious psychological injury requiring professional treatment occurred to a victim[.]" MCL 777.34(1)(a). The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning a victim's psychological injury. See MCL 750.227b; MCL 750.349b. The trial court's assessment of 10 points for OV 4 was therefore based on judicial fact-finding.

As discussed, OV 7 addresses aggravated physical abuse. MCL 777.37(1); *Hardy*, 494 Mich at 439. On the date of the crimes in this case, OV 7 required a score of 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense[.]" MCL 777.37(1)(a). The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element concerning the facts needed to score this OV. See MCL 750.227b; MCL 750.349b. The trial court's assessment of 50 points for OV 7 was therefore based on judicial fact-finding.

OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40(1). A 5 point score is required if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious[.]" MCL 777.40(1)(c). The jury made no finding and defendant made no admission concerning the facts necessary to score this OV. Neither of the offenses of which defendant was convicted, i.e., felony-firearm and unlawful imprisonment, contains an element

concerning the facts needed to score this OV. See MCL 750.227b; MCL 750.349b. The trial court's assessment of 5 points for this OV was therefore based on judicial fact-finding.

Subtracting 100 points from the OV 3 score, 10 points from the OV 4 score, 50 points from the OV 7 score, and 5 points from the OV 10 score, reduces defendant's total OV score from 195 points to 30 points. This changes his OV level from VI to III, causing his sentencing cell to change from D-VI to D-III on the Class C grid. His sentencing guidelines range would then become 29 to 57 months, instead of the originally calculated range of 50 to 100 months. See MCL 777.64. It follows, then, that facts admitted by defendant or found by the jury beyond a reasonable doubt at trial were insufficient to assess the minimum number of OV points necessary for defendant's score to fall within the cell of the sentencing grid under which he was sentenced. Defendant's unlawful imprisonment sentences were not subject to an upward departure from the originally calculated range; his 100-month minimum sentences for unlawful imprisonment fell within the calculated guidelines range of 50 to 100 months. Therefore, an unconstitutional constraint on the trial court's sentencing discretion impaired defendant's constitutional rights. See *Lockridge*, 498 Mich at 364. Defendant was sentenced before July 29, 2015. It is therefore necessary to remand the case to the trial court in accordance with the remand procedure set forth in *Lockridge*, as described earlier in this opinion, to determine whether the court would have imposed a materially different sentence but for the constitutional error. See *id.* at 395-399.

We affirm defendant's convictions but remand for correction of the judgment of sentence to reflect a term of five years' imprisonment for defendant's felony-firearm conviction and for reconsideration of defendant's unlawful imprisonment sentences. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Amy Ronayne Krause

# APPENDIX B

# Criminal Justice

## Juvenile History:

NO. 1 OF 1

| | |
|---|---|
| **Offense Date:** | 1986 |
| **Petition Date:** | 1986 |
| **Petitioning Agency:** | Detroit Police Department |
| **Charge(s) at Petition:** | Weapons - Carrying Concealed |
| **Court of Jurisdiction:** | Wayne County Juvenile Court (Petition # 86-253541) |
| **Final Charges:** | **Weapons - Carrying Concealed** |
| **Adjudication Date/Method:** | Unknown |
| **Sentence/Disposition:** | Jurisdiction was taken, and the defendant was placed on Probation |
| **Sentence/Disposition Date:** | Unknown |
| **Attorney Present:** | Unknown |
| **Discharge Date:** | 01/06/1987 |
| **Notes:** | Public Safety / E |

## Adult History:

NO. 1 OF 7

| | |
|---|---|
| **Offense Date:** | 06/24/1991 |
| **Status at Time of Offense:** | Not Applicable |
| **Arrest Date:** | 06/24/1991 |
| **Arresting Agency:** | Detroit Police Department |
| **Charge(s) at Arrest:** | Stolen Property - Receiving/Concealing - Over $100 |
| **Court of Jurisdiction:** | Detroit Recorder's Court (Docket # 91-00748502) |
| **Final Charges:** | **Not Applicable** |
| **Conviction Date/Method:** | Not Applicable |
| **Disposition:** | Found not guilty |
| **Disposition Date:** | 10/09/1991 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | Not Applicable |
| **Notes:** | |

NO. 2 OF 7

| | |
|---|---|
| **Offense Date:** | 04/05/1994 |
| **Status at Time of Offense:** | Not Applicable |
| **Arrest Date:** | 04/05/1994 |
| **Arresting Agency:** | Detroit Police Department |
| **Charge(s) at Arrest:** | Count I: Weapons - Felony Firearm<br>Count II: Assault With Intent to Murder<br>Count III: Assault With Intent to Murder |
| **Court of Jurisdiction:** | Detroit Recorder's Court (Docket # 94-00408102) |
| **Final Charges:** | **Not Applicable** |
| **Conviction Date/Method:** | Not Applicable |
| **Disposition:** | Dismissed |
| **Disposition Date:** | 03/13/1995 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | Not Applicable |
| **Notes:** | |

NO. 3 OF 7

| | |
|---|---|
| **Offense Date:** | 06/09/1996 |
| **Status at Time of Offense:** | Not Applicable |
| **Arrest Date:** | 06/09/1996 |
| **Arresting Agency:** | Center Line Department of Public Safety |
| **Charge(s) at Arrest:** | Domestic Violence |
| **Court of Jurisdiction:** | 37th District Court - Warren (Docket # 238746) |
| **Final Charges:** | **Not Applicable** |
| **Conviction Date/Method:** | Not Applicable |
| **Disposition:** | Dismissed |
| **Disposition Date:** | 08/28/1996 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | Not Applicable |
| **Notes:** | |

NO. 4 OF 7

| | |
|---|---|
| **Offense Date:** | 09/08/1996 |
| **Status at Time of Offense:** | Not Applicable |
| **Arrest Date:** | 09/08/1996 |
| **Arresting Agency:** | Center Line Department of Public Safety |
| **Charge(s) at Arrest:** | Weapons - Carrying Concealed |
| **Court of Jurisdiction:** | 37th District Court - Warren (Docket # C239592) |
| **Final Charges:** | **Not Applicable** |
| **Conviction Date/Method:** | Not Applicable |
| **Disposition:** | Dismissed |
| **Disposition Date:** | 10/16/1996 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | Not Applicable |
| **Notes:** | |

NO. 5 OF 7

| | |
|---|---|
| **Offense Date:** | 01/04/1997 |
| **Status at Time of Offense:** | Not Applicable |
| **Arrest Date:** | 01/04/1997 |
| **Arresting Agency:** | Southfield Police Department |
| **Charge(s) at Arrest:** | Count I: Assault With Intent to Murder<br>Count II: Assault With a Deadly Weapon (Felonious Assault)<br>Count III: Weapons - Felony Firearm<br>Count IV: Weapons - Felony Firearm |
| **Court of Jurisdiction:** | 6th Circuit Court - Oakland County (Docket # 97-150587-FC) |
| **Final Charges:** | **Count I: Assault With a Deadly Weapon (Felonious Assault)**<br>**Count II: Assault With a Deadly Weapon (Felonious Assault)**<br>**Count III: Weapons - Felony Firearm**<br>**Count IV: Weapons - Felony Firearm** |
| **Conviction Date/Method:** | 07/30/1997 / Jury |
| **Sentence/Disposition:** | Counts I and II: 2 to 4 years MDOC; Counts III and IV: 2 years MDOC; Must attend a Domestic Violence Program as a condition of Parole |
| **Sentence Date:** | 08/18/1997 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | 05/26/2002 |
| **Notes:** | (Person / F) (Person / F) (Public Safety / No Prosecutor Crime Class) |
| | Paroled 10/06/2000; Discharged from Parole 05/26/2002 |

NO. 6 OF 7

| | |
|---|---|
| **Offense Date:** | 05/26/2009 |
| **Status at Time of Offense:** | Not Applicable |
| **Arrest Date:** | 05/30/2009 |
| **Arresting Agency:** | Warren PD |
| **Charge(s) at Arrest:** | Count I: Homicide - Murder - 1st Degree - Premeditated<br>Count II: Homicide - Felony Murder<br>Count III: Weapons - Felony Firearm<br>Count IV: Unlawful Imprisonment<br>Count V: Unlawful Imprisonment<br>Count VI: Home Invasion - 1st Degree<br>Count VII: Assault With Intent to Commit Great Bodily Harm Less Than Murder<br>Count VIII: Weapons - Carrying Concealed - With Intent |
| **Court of Jurisdiction:** | 16th Circuit Court - Macomb County (Docket # 09-2637-FC) |
| **Final Charges:** | **Count I: Homicide - Murder - 2nd Degree**<br>**Count II: Homicide - Felony Murder**<br>**Count III: Weapons - Felony Firearm**<br>**Count V: Assault With Intent to Commit Great Bodily Harm Less Than Murder**<br>**Count VI: Unlawful Imprisonment**<br>**Count VII: Unlawful Imprisonment** |
| **Conviction Date/Method:** | 12/10/2009 / Jury |
| **Sentence/Disposition:** | Count I: 36 to 60 years MDOC; Count II: Life - MDOC - without parole; Count III: 5 years MDOC; Count V: 5 to 10 years MDOC; Counts VI and VII: 5 to 15 years MDOC |
| **Sentence Date:** | 01/20/2010 |

| | |
|---|---|
| **Attorney Present:** | Yes |
| **Discharge Date:** | Unknown |
| **Notes:** | (Person) (Person) (Public Safety) (Person / D) (Person / C) (Person / C) |
| | In an Order dated 05/24/2012, the Supreme Court granted the Def leave to appeal - Sentence Vacated. |
| | See case 7 of 7 in Criminal Record for current information |

**NO. 7 OF 7**

| | |
|---|---|
| **Offense Date:** | 05/26/2009 |
| **Status at Time of Offense:** | None |
| **Arrest Date:** | 05/30/2009 |
| **Arresting Agency:** | Warren Police Department |
| **Charge(s) at Arrest:** | Count I: Murder - 2nd Degree<br>Count II: Weapons - Felony Firearm<br>Count III: Assault With Intent to Commit Great Bodily Harm Less Than Murder<br>Count IV: Unlawful Imprisonment<br>Count V: Unlawful Imprisonment |
| **Court of Jurisdiction:** | 16th Circuit Court - Macomb County (Docket # 09-2637-FC) |
| **Final Charges:** | **Count II: Weapons - Felony Firearm**<br>**Count IV: Unlawful Imprisonment**<br>**Count V: Unlawful Imprisonment** |
| **Conviction Date/Method:** | 10/08/2014 / Jury |
| **Sentence/Disposition:** | **Pending - Instant Offense** |
| **Sentence Date:** | 11/19/2014 |
| **Attorney Present:** | Yes |
| **Discharge Date:** | Pending |
| **Notes:** | (Public Safety) (Person / C) (Person / C) |

## Personal Protection Order(s):

None.

## Secretary of State Driving Record:

Not applicable.

## Gang Involvement:

There has been no known prior gang involvement for the defendant.